STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal from the Michigan Court of Appeals)

FEDERATED INSURANCE COMPANY,
a foreign corporation, as Subrogee of
Carl M. Schultz, Inc.

Plaintiff,

and

ATTORNEY GENERAL,

Appellant,

v.

ROAD COMMISSION FOR OAKLAND COUNTY,

Defendant-Appellee,

Supreme Court No. 126886
Court of Appeals No. 244009
Oakland Circuit No. 00-027170-CZ

BRIEF ON APPEAL – APPELLEE

Elizabeth Jolliffe (P42712)
Paul C. Smith (P55608)
Attorneys for Defendant-Appellee

Clark Hill PLC
500 Woodward, Suite 3500
Detroit, MI 48226
(313) 965-8300

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COUNTER-STATEMENT REGARDING JURISDICTION

The Michigan Attorney General ("AG") filed an application for leave to appeal from the July 13, 2004 decision of the Court of Appeals. The application is not sufficient to confer jurisdiction on this Court because the AG never properly become a party in the Court of Appeals. On August 23, 2004, after the Court of Appeals proceedings were already resolved, the AG filed a "notice" of intervention in the Court of Appeals under the authority of MCL 14.28. The AG never filed a motion to intervene. Consequently, the Court of Appeals never ruled on the AG's announced intention to intervene or otherwise acknowledged the AG as a party.

If the Court of Appeals *had* been asked, by motion, to rule on the AG's desire to intervene, there are at least two reasons why such a motion would have been denied. First, the statute upon which the AG relies, MCL 14.28, allows the AG to intervene into a "cause or matter" when "the people of this state may be a party or interested." Here, because the case was already over in the Court of Appeals when the AG filed its notice of intervention, there was no "cause or matter" still pending in the Court of Appeals. Intervention under MCL 14.28, necessarily requires a pending action for the AG to join. See *School Dist of Ferndale v Royal Oak Twp School Dist No 8*, 293 Mich 1, 12; 291 NW 199 (1940), quoting *Zeitinger v Hargadine-McKittrick Dry Goods Co*, 298 Mo 461; 250 SW 913 (1923) (explaining that the right to seek intervention necessarily requires a timely request while the action into which the intervenor seeks to intervene is still "pending").

Second, because intervention under MCL 14.28 requires that the state have an "interest," intervention is not automatic. It cannot be accomplished by the AG alone.

The Legislature has placed limits on the AG's right become involved in a case. In order for the AG properly to intervene, the AG must conclude "in his own judgment that the interests of the state require it," and the matter must be one "in which the people of this state may be a party or interested." MCL 14.28. The last clause of the statute—which ensures the existence of an actual case or controversy—necessarily requires *the court* to pass on the propriety of intervention; otherwise it would be superfluous. The State of Michigan had no particularized interest in this case. In any event, because the Court of Appeals was never asked to rule on the AG's desire to intervene, and never did rule on the AG's desire to intervene, the AG never became a party in the Court of Appeals.

In sum, because the AG never properly became a party in the Court of Appeals, it never had standing to file its application for leave to appeal. Under the plain language of MCR 7.302, the right to file an application for leave to appeal is limited to a person or entity that is a "party" to the opinion or order of the Court of Appeals. No other party filed an application for leave to appeal. Therefore, this Court lacks jurisdiction over the AG's appeal. The May 12, 2004 order granting the AG's application for leave to appeal must be vacated.

COUNTER STATEMENT OF THE QUESTIONS PRESENTED

Procedural Questions

I. WHERE THE AG NEVER FILED A MOTION TO INTERVENE AND THE COURT NEVER RECOGNIZED THE AG AS A "PARTY," HAS THE AG PROPERLY INVOKED THIS COURT'S JURISDICTION?

The trial court did not address this question.

The Court of Appeals did not address this issue.

The AG presumably would answer that it became a party merely by virtue of its provision of a "notice of intervention."

The Road Commission answers "No." A Court of Appeals order recognizing the AG as a party was required.

II. WHERE THE COURT OF APPEALS CASE WAS ENTIRELY RESOLVED BEFORE THE AG FILED ITS "NOTICE" OF INTERVENTION, WAS THERE ANY PENDING "CAUSE OR MATTER" INTO WHICH THE AG PROPERLY COULD INTERVENE?

The trial court did not address this question.

The Court of Appeals did not address this question.

The AG presumably would answer "Yes."

The Road Commission answers "No."

III. WHERE THE STATE OF MICHIGAN'S "INTEREST" IN THIS CASE IS NOT SUFFICIENT TO GIVE RISE TO A JUSTICIABLE CASE OR CONTROVERSY, WAS THE AG ENTITLED TO INTERVENE AND PARTICIPATE UNDER MCL 14.28?

The trial court did not address this question.

The Court of Appeals did not address this question.

The AG presumably would answer "Yes."

The Road Commission answers "No."

IV. DOES THE AG HAVE STANDING TO ASSERT THE RIGHTS OF A THIRD-PARTY THAT IS NO LONGER INVOLVED IN THIS LITIGATION?

The trial court did not address this question.

The Court of Appeals did not address this question.

The AG presumably would answer "Yes."

The Road Commission answers "No."

V. WHERE THE ORIGINAL PLAINTIFF HAS ELECTED NOT TO FILE AN APPLICATION FOR LEAVE TO APPEAL FROM THE ADVERSE COURT OF APPEALS DECISION, AND HAS THEREBY FORFEITED ITS RIGHT TO CONTINUE IN THIS LITIGATION, IS THE QUESTION ON APPEAL MOOT?

The trial court did not address this question.

The Court of Appeals did not address this question.

It is not clear how the AG would answer this question, since it is not clear whether the AG desires (or would be permitted) to proceed on behalf of the plaintiff on remand.

The Road Commission answers "Yes."

VI. WHERE THE ISSUES RAISED FOR THE FIRST TIME ON APPEAL BY THE AG WERE NOT ADDRESSED BY THE TRIAL COURT OR THE COURT OF APPEALS, ARE THEY PROPERLY BEFORE THIS COURT?

The trial court did not address this question.

The Court of Appeals did not address this question.

The AG presumably would answer "Yes."

The Road Commission answers "No."

Substantive Questions

VII. WAS THE WORK INITIATED BY THE ORIGINAL PLAINTIFF IN 1991 A "REMEDIAL ACTION SELECTED OR APPROVED BY THE DEPARTMENT" WITHIN THE MEANING OF MCL 324.20140?

The trial court answered "Yes."

The Court of Appeals answered "Yes."

The AG answers "No."

The Road Commission answers "Yes."

VIII. CAN A COST RECOVERY ACTION ACCRUE BEFORE ANY COSTS HAVE BEEN INCURRED BY THE PLAINTIFF?

The trial court did not address this question, since it does not fit the actual facts of this case.

The Court of Appeals did not address this question, since it does not fit the actual facts of this case.

The AG answers "No."

The Road Commission also answers "No," but notes that this issue does not fit the actual facts of this case.

IX. DOES THE INITIATION OF WORK FOR ONE RELEASE OF HAZARDOUS SUBSTANCES BEGIN THE RUNNING OF THE STATUTE OF LIMITATIONS FOR ANY SUBSEQUENT OR UNRELATED RELEASE OF HAZARDOUS SUBSTANCES?

The trial court did not address this question.

The Court of Appeals did not address this question.

The AG answers "No."

The Road Commission answers that it depends on the circumstances. In *this* case, where a single remedial action remedied two separate and unrelated releases—both present before the initiation of physical on-site construction—the limitations period began to run upon the initiation of physical on-site construction activities for the single remedial action that actually occurred.

INTRODUCTION & SUMMARY OF ARGUMENT

This is not a typical case. It is unusual from both a procedural and a substantive standpoint. Procedurally, it is unusual because the only party in a position to benefit from a reversal of the Court of Appeals decision did not seek leave to appeal and, consequently, is no longer participating in the action. The entity advocating on behalf of the original plaintiff never properly became a party to this action and, presumably, would not and could not continue to advocate on behalf of the original plaintiff on remand.

Substantively, this case is unusual because it involves an uncommon factual scenario not likely to recur with significant frequency. The original plaintiff, through a single remedial action, allegedly remedied two separate and unrelated releases of hazardous substances. Both releases existed before the initiation of physical on-site construction activities. The first release, which prompted the response activity, was known to the original plaintiff before any response activity costs were incurred. The second alleged release was a matter of public information that became known to the original plaintiff shortly after the initiation of physical on-site construction activities, i.e., well within the six-year limitation period.

There are a number of independent procedural reasons why this Court should vacate its order granting leave to appeal:

I. This Court lacks jurisdiction over this matter because the AG never properly became a party in the Court of Appeals before filing its application for leave to appeal. The AG never properly became a party because it did not file a motion to intervene and the Court of Appeals did not rule on, or otherwise indicate its approval of, the AG's

stated intention to intervene. Only a party recognized by the Court of Appeals may appeal from a Court of Appeals decision.

II. The AG could not properly intervene into the Court of Appeals because, at the time when it filed its "notice of intervention," the Court of Appeals action was already resolved and no longer a pending "cause or matter."

III. The AG could not properly intervene into this case because the State of Michigan does not have a justiciable "interest" in the outcome of the litigation. The AG's concern about how the precedential effect of the Court of Appeals decision might affect some *future* action involving the State of Michigan is not sufficiently concrete or particularized to confer standing upon the AG. Asking the Court to effectively resolve the hypothetical future action before it actually occurs is tantamount to seeking an advisory opinion.

IV. As a matter of constitutional law, one may not assert the rights of third parties. Accordingly, the AG may not now stand in the shoes of the original plaintiff and litigate this case on its behalf.

V. Because the original plaintiff (the *only* party adversely affected by the Court of Appeals decision) has forfeited its rights to continue in this litigation by failing to seek leave to appeal from the Court of Appeals decision, the questions on appeal are moot. A holding that the original plaintiff's claim is not barred by the statute of limitations presents only an abstract question of law where the original plaintiff has forfeited its right to proceed in the litigation.

VI. Because the AG made new arguments that were not put forth by the original plaintiff, none of the specific issues on appeal were considered by the trial court. Therefore, none of the AG's arguments were preserved for appeal.

In addition to the procedural problems with this appeal, there are a number of substantive reasons why the Court of Appeals decision should be affirmed:

VII. Under the plain meaning of the statute defining "remedial action," MCL 324.20101(cc), the original plaintiff's construction of a groundwater treatment system to clean, remove, contain, isolate, treat, and monitor hazardous releases on its subrogor's property constituted a "remedial action." It is undisputed that physical construction of the groundwater treatment system began in 1991, more than six years before the original plaintiff filed this action. It is also clear that the groundwater treatment system was "selected or approved" by the Michigan Department of Natural Resources ("MDNR") on January 22, 1993. Accordingly, under the plain language of the applicable statute, the six-year limitations period on the original plaintiff's cost recovery action began to run in 1991—nine years before this case was filed. Nothing in the language of the statute requires that the "remedial action" be "selected or approved" by the department *before* the statute of limitations begins to run. To the contrary, the limitations period is tied only to the "initiation of physical on-site construction activities." MCL 324.20140(1)(a). In any event, even if the limitations period accrued on the approval date, the original plaintiff's claim still would have been outside of the limitations period.

VIII. The AG's argument that a cost-recovery action cannot accrue until response activity costs have been incurred is a red herring. In this case, the original plaintiff sued to recover response activity costs already incurred in establishing a groundwater

treatment system. The hypothetical situation envisioned by the AG (involving a second party taking over an earlier, unfinished remedial effort) is not relevant *to this case*. Courts are not in the business of deciding hypothetical cases.

IX. Finally, depending on the circumstances, the initiation of work for one release of hazardous substances *may or may not* begin the running of the statute of limitations for any subsequent or unrelated release.[1] The focus of a cost recovery action is to recoup the costs of response activities from potentially liable parties. Because one cannot bring a cost recovery action until after response activity costs have been incurred, the proper focus for statute of limitations purposes is not on the nature of the release, but rather on the response activity itself. If a party begins spending money on remedial action, it is not unreasonable or unfair to require that party, within six years, to identify and bring suit against the other parties potentially responsible for the release that it is already spending money to remedy—especially, as in this case, where the defendant's release occurred before the initiation of physical on-site construction activities and was known to the original plaintiff within six-years thereafter.

Much of the difficulty present in this case is caused by the fact that the party pursuing the Michigan Supreme Court appeal has no direct interest in the outcome (only in the precedential effect of the Court of Appeals decision) and was not present in the trial court or Court of Appeals when this case was being litigated. As a result, the AG has a poor understanding of, and little concern about, the actual facts and is making

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[1] Whether the initiation of work for one release would begin the running of the statute of limitations for a "subsequent" release—a question posed in this Court's grant order—is not directly relevant to the resolution of this case, because it is undisputed that the Road Commission's release occurred *before* the accrual of the original plaintiff's cost recovery action.

arguments that were never raised below based on hypothetical situations that have not yet occurred. This case is, therefore, a poor candidate for resolution by this Court.

COUNTER-STATEMENT OF FACTS

The underlying facts are not disputed.[2] The Road Commission operates a facility on Lapeer Road, in Lake Orion, adjacent to property that was once owned by the original plaintiff's subrogor, Carl M. Schultz, Inc. ("CMS"). CMS operated a gasoline filling station on the adjacent property. In February 1988, CMS discovered that its underground storage tank and piping system had released petroleum into the soil causing a contamination of Benzene, Toluene, Ethyl Benzene, and Xylene ("BTEX"). (Appendix A, p3b, Plaintiff's Complaint, ¶ 4).[3] On May 18, 1988, over twelve years before this action was filed, the MDNR directed CMS to "take all corrective actions necessary to remediate any environmental damage that has occurred." (Appendix B, pp 6b-7b, 5/18/88 MDNR letter to CMS).

To address the BTEX problem, CMS arranged for the construction of a "treatment system" to clean the contaminated groundwater. Three years after the MDNR ordered "corrective" action, CMS began construction of an on-site treatment system. (Appendices C-H & J, pp 8b-25b & 34b-37b, Memos from Kraus & Kriscunas, P.C., with attached invoices; Appendix I, pp 26b-33b, Claim Photo Sheet, showing external and internal photos of on-site treatment system). On November 1, 1991, Northend Builders began erecting a 20-foot by 20-foot building to house the treatment system. (Appendix

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[2] In response to the Road Commission's motion for summary disposition, the original plaintiff made only legal arguments and did not challenge the factual recitation. (Appendix S, pp 68b-69b).

[3] Appendices A-R, pp 1b-62b, were attached as exhibits to the Road Commission's motion for summary disposition in the trial court.

E, pp 16b-17b, Invoice from Northend Builders; Appendix F, pp 18b-22b, Monthly Status Report from F.D. Meyers Associates, showing that "the walls were up" on November 1, 1991). The treatment system was "essentially complete" on December 16, 1991. (Appendix G, p 23b, Kraus & Kriscunas Status Report). Photographs dated February 26, 1992, show the CMS site with the finished treatment building. (Appendix I, pp 26b-33b). CMS started operation of the treatment system on February 21, 1992. (Appendix J, pp 34b-37b, Monthly Status Report from F.D. Meyers Associates). Almost one year later, on January 22, 1993, the MDNR indicated its formal approval of the CMS groundwater treatment system in a letter to CMS. (Appendix K, pp 38b-41b, MDNR letter to CMS).

In its complaint, the original plaintiff (Federated Insurance Company) alleged that "between 1988 and 1999," the Road Commission "released petroleum and/or other hazardous and polluting substances into the soil and groundwater." (Appendix A, p 3b, ¶ 9). The original plaintiff further asserted that the Road Commission's release "significantly contributed to the contamination on the [CMS] property, and has increased the associated remediation costs." *Id.* It is undisputed that "no specific cleanup and/or remediation efforts were undertaken" in response to the Road Commission's release. (Appendix L, pp 47b-48b, Plaintiff's Answers to Defendant's First Set of Interrogatories). Instead, the original plaintiff claims that it inadvertently cleaned up the Road Commission's release as a result of its efforts to clean up its own release. *Id.*

The Road Commission reported a release of petroleum hydrocarbons on its property to the Michigan State Police Fire Marshall in April and May of 1991, making it a matter of public record. (Appendix M, pp 52b-53b, Reports of Confirmed Releases).

By as early as January 29, 1992, CMS and the original plaintiff had actual knowledge of a petroleum release on the Road Commission's adjacent property and planned further investigation of the Road Commission's role, if any, in the contamination present on the CMS site. (Appendix N, p 54b, Internal Memo by the original plaintiff's Claims Supervisor, Jeffrey A. Svestka). In January of 1992, the original plaintiff described the Road Commission as a "suspected upgradient source." (Appendix I, p 33b). The original plaintiff's investigation of the Road Commission continued in 1993 and 1994. (Appendix O, p 55b, Correspondence from Kraus & Kriscunas, P.C. to the original plaintiff; Appendix P, p 56b, internal memo of the original plaintiff regarding investigation of the Road Commission). Then, on February 15, 1995, the MDNR determined, through "finger print analysis," that "free product" detected in the CMS treatment system originated from the Road Commission's release. (1995 letter from MDNR to CMS, Intervening Appellant's Appendix, pp 18a-20a, March 28).

On September 4, 1996, the original plaintiff's attorney sent a "60-day notification" letter to the Road Commission indicating "that Federated Insurance Company, as subrogee of Carl M. Schultz, Inc., intends to bring a cost recovery action against the Oakland County Road Commission for petroleum contamination discovered at [the CMS site]." (Appendix Q, p 57b, 60-Day Notification Letter). Thirteen months later, and nearly six years after the initiation of physical on-site construction activities, the same attorney sent a letter to the Road Commission seeking a tolling agreement to circumvent "statute of limitations issues." (Appendix R, pp 58b-62b, Proposed Tolling Agreement Letter). The letter warned that the agreement had to be executed "by the end of October, 1997, to avoid litigation." *Id.* The Road Commission never agreed to

execute the tolling agreement; nor did the original plaintiff file suit "by the end of October, 1997."

On November 1, 2000, more than nine years after the initiation of physical on-site construction activities, the original plaintiff brought a cost recovery suit against the Road Commission, under Part 201 of Michigan's Natural Resources and Environmental Protection Act ("NREPA"), MCL 324.101 *et. seq.* (Appendix A, pp 1b-5b). After engaging in discovery, the Road Commission moved for summary disposition under MCR 2.116(C)(7), arguing that the complaint was time-barred.

The Road Commission based its statute of limitations argument on the undisputed evidence showing that the complaint was filed more than six years after the initiation of physical on-site construction activities began on November 1, 1991. In response to the Road Commission's brief, the original plaintiff did not dispute any of the facts supporting the Road Commission's motion, but instead argued *only* that the applicable statute of limitations was subject to a "discovery rule." The original plaintiff's theory was that the statute of limitations did not accrue until 1995, when it learned through the MDNR's "finger print" analysis, that it had been cleaning up the Road Commission's release as well as its own release. (Appendix S, pp 68b-69b, the original plaintiff's response to the Road Commission's motion for summary disposition). Based on the facts then before it, the trial court granted the Road Commission's motion for summary disposition. On the legal question raised by the original plaintiff, the trial court held that the plain language of the statute of limitations left no room for the application of a "discovery rule" to extend the time within which a cost recovery action may be timely filed. (Trial Court Opinion, Intervening Appellant's Appendix, pp 23a-27a).

On appeal, the original plaintiff expanded its argument somewhat. Instead of relying solely on the existence of a "discovery rule," the original plaintiff added a new (and unpreserved) argument that the statute of limitations had not yet begun to run because CMS's final "corrective action plan" had not yet been approved by the state. (See Federated Insurance Company's Court of Appeals Brief, pp 12-20). The original plaintiff also argued, contrary to its position in the trial court, that a question of fact existed as to the actual date that physical on-site construction activities began.[4] *Id.* at pp 20-22. In response to these arguments, the Road Commission argued (1) that the plain language of the statute of limitations did not allow for the application of a discovery rule, (2), that it was undisputed that the department had approved the remedial action for which the original plaintiff sought recovery, and (3) that the original plaintiff could not seriously dispute the fact that it began building the groundwater treatment system in 1991. (The Road Commission's Court of Appeals Brief.)

The Court of Appeals affirmed the trial court in a published opinion. It reasoned, based on the plain language of the applicable statutes, that CMS's construction of the groundwater treatment system, beginning in November 1991, constituted on-site construction activities for a remedial action that was ultimately approved by the department. This activity triggered the six-year statute of limitations. The Court explained that nothing in the statute of limitations required approval by the department before a response activity may be deemed a "remedial action." Finally, the Court of Appeals rejected the original plaintiff's request for application of a "discovery rule,"

[4] Notably, the original plaintiff's Court of Appeals brief did *not* make any argument based on the asserted distinction between the statutory terms "interim response activity" and "remedial action."

reasoning, like the trial court before it, that the plain language of the statute of limitations gave persons incurring response activity costs six years from the initiation of physical on-site construction activity to identify and file suit against parties potentially responsible for the costs being incurred. (Court of Appeals opinion, slip op pp 3-4.) Up to this point, the AG had no involvement in the case.

The Court of Appeals opinion was issued on July 13, 2004. The original plaintiff did not file a motion for reconsideration within the 21-day period allowed by MCR 7.215(I). Nor did the original plaintiff (the only party adversely affected by the Court of Appeals decision) file an application for leave to appeal within the 42-days allowed by MCL 7.302(C)(2).[5] On August 23, 2004, after the Court of Appeals case was already closed, the AG announced its intention to intervene in the Court of Appeals by filing a "notice of intervention" citing MCL 14.28. The AG was not a party to the action when the Court of Appeals issued its opinion affirming the Court of Appeals decision. Nor was the AG a party during the time for filing a motion for reconsideration in the Court of Appeals. Moreover, while it is unclear whether the Court of Appeals accepted the AG's "notice" of intervention as a miscellaneous filing, it is clear that the Court of Appeals never ruled that the AG could intervene and never recognized the AG as a party to the case. (Appendix T, p 91b, Docket Sheet).

Despite the fact that the AG never became a party, the AG filed an application for leave to appeal and its application was granted.

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[5] The original plaintiff later attempted to file a "cross appeal" from the AG's application for leave to appeal. This was denied.

STANDARD OF REVIEW

Review of trial court's decision on a motion for summary disposition is de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A defendant is entitled to summary disposition under MCR 2.116(C)(7) if the plaintiff's claim is barred by the statute of limitations. "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered." *Maiden*, *supra* at 119. Moreover, "[t]he contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id.*

This case involves also the interpretation of MCL 324.20140(1)(a). Issues of statutory interpretation are also reviewed de novo. *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 250-251; 632 NW2d 126 (2001).

ISSUE PRESERVATION

It is a well-established doctrine in Michigan that issues must be raised in the trial court in order to be preserved for appeal. See generally *Napier v Jacobs*, 429 Mich 222, 227-229; 414 NW2d 862 (1987). In this case, none of the arguments now raised by the AG were made by the original plaintiff before the trial court. Therefore, the AG's arguments are not preserved for appeal.

PROCEDURAL ARGUMENT

The AG does not care what happens to the original plaintiff or to the Road Commission. The State of Michigan will never be in a position to collect any money from the Road Commission in this cost recover action because the State of Michigan never incurred any costs. What the AG really cares about is the precedential effect of the

Court of Appeals decision. In its application for leave to appeal and its brief on appeal, the AG imagines what might happen later, in some hypothetical future case, if the Court of Appeals decision is not reversed. (See the AG's brief at p 19 and its application for leave to appeal, pp vi-vii, 6, 15-17, 19-20). But that is not a legitimate basis upon which to *resolve* this case. While this Court must be cognizant of the effect of its decisions beyond the present parties, it still must decide cases based on the actual facts presented; it should not be in the business of resolving hypothetical future issues in a factual vacuum.

The only party adversely affected by the Court of Appeals decision is no longer participating in this case. It has been replaced by the AG, which has raised a number of entirely *new* arguments that were neither raised nor decided below. If the events forecasted by the AG come to pass in some future case actually involving the State of Michigan, then the AG will be free to raise its new arguments in that case. It will also be able to argue that its case is factually distinguishable from the present case. But, in the interest of justice, this Court should wait until *that* future case arises to address the AG's broad concerns. It should do this for prudential reasons, but it must do so for jurisdictional reasons. Because the AG never properly became a party in the Court of Appeals, this Court never properly obtained jurisdiction over this matter.

The following sections address why this Court may not and should not proceed any further with this case.

I. THIS COURT DOES NOT HAVE JURISDICTION BECAUSE THE COURT OF APPEALS NEVER RULED THAT THE AG COULD INTERVENE AND NEVER OTHERWISE RECOGNIZED THE AG AS A PARTY IN THIS CASE.

The AG's application for leave to appeal was based on its claim that it intervened into this case at the Court of Appeals level. That is not true. The AG filed no motion to

intervene in the Court of Appeals and the Court of Appeals never ruled that the AG may participate as a party. (See Appendix T, p 91b).

The statute upon which the AG relied in its "Notice of Intervention" provides that the AG will have a right to intervene only in certain circumstances. MCL 14.28. This right to intervene is not unconditional, but limited to cases "in which the people of this state may be a party or [are] interested." *Id.* If the people of the State of Michigan are not "interested" within the meaning of MCL 14.28, then there is no right to intervene. In this case, the AG did not ask the Court of Appeals to determine whether the people of the State of Michigan are "interested" within the meaning of MCL 14.28. Accordingly, the Court of Appeals never made a ruling on the key question controlling the AG's purported status in the Court of Appeals.

Because the Court of Appeals did not rule on the question whether the AG was entitled to intervene, and never declared that the AG should be recognized as a plaintiff or defendant or any other kind of party in the Court of Appeals case, it cannot be said that the AG actually intervened into this action while the case was pending in the Court of Appeals. At most, the AG caused a paper asserting that the AG had "intervened" to be placed in the Court of Appeals file. Therefore, the AG never became a party and has no basis to file this application for leave to appeal. To hold that this Court may exercise its jurisdiction over this appeal would be to hold that the AG may unconditionally declare itself a "party" in any case, at any time, without court approval.

Under the plain language of MCR 7.302(A), only a "party" may seek leave to appeal in the Supreme Court from an opinion or order of the Court of Appeals. Because the Court of Appeals did not rule that the AG would be allowed to intervene or

acknowledge the AG as a "party" of any sort before the AG filed its application for leave to appeal, the AG is not entitled to seek relief from this Court. Moreover, because the time for filing an application for leave to appeal from the underlying decision has passed, a remand to allow the AG to *file* a motion to intervene would serve no useful purpose. The order granting the AG's application for leave to appeal must be dismissed for lack of jurisdiction.

II. THE AG COULD NOT PROPERLY INTERVENE IN THE COURT OF APPEALS BECAUSE THE CASE WAS ALREADY OVER WHEN THE AG SOUGHT TO DO SO.

When the Court of Appeals affirmed the trial court's decision, it finished doing all that it could do in this case. Thus, when the AG declared its intention to intervene into the Court of Appeals matter, there was nothing left to be accomplished and nothing left in which to intervene. Nothing was pending.

The statute upon which the AG relies, MCL 14.28, states that the AG may "intervene in and appear for the people of this state in . . . any cause or matter . . . ." The statute thus necessarily requires a pending "cause or matter" in which to intervene. A case the is over is no longer a "cause or matter." Here, because the Court of Appeals opinion was already issued (finally resolving the litigation in favor of the Road Commission), and the 21-day time period for filing a motion for reconsideration under MCR 7.215(I) had already passed, nothing more could happen in the court into which the AG sought to intervene. Because the process of intervention into a "cause or matter" necessarily assumes the existence of ongoing litigation, it was simply too late for the AG to intervene in the Court of Appeals. The AG may have been entitled to intervene at the Supreme Court if the original plaintiff had decided to file an application for leave to appeal, but that is not what happened here.

This view is supported by the case law. In *John Wittbold & Co v Ferndale*, 281 Mich 503, 513; 275 NW2d 225 (1937), this Court explained that the AG's statutory right to intervene "does not give the State any greater or different rights than are possessed by a private party who intervenes . . . ." On the question of intervention generally, the timing of a request to intervene is critical. A request to intervene may not be asserted after the fact:

> Parties who would otherwise be granted leave to intervene are denied consideration where they *sit by and allow litigation to proceed without requesting leave to enter the case*; and intervention is generally denied where it would delay the trial or the adjudication.
>
> > "It is the general rule that an intervention is not a proper proceeding where it will have the effect of retarding the principal suit, or delaying the trial of the action, or requiring that the case shall be reopened for further evidence, of changing the position of the original parties, or of complicating the case and producing a multifariousness of parties and causes of action." 47 C.J. p 108.

[*School Dist of Ferndale v Royal Oak Twp School Dist No 8*, 293 Mich 1, 10; 291 NW 199 (1940) (emphasis added).] In the same decision, this Court reiterated the common sense notion that intervention, by necessity, requires a pending matter:

> "The very nature of an intervention which we have defined as in the civil law to be an action by which a third party becomes party in a suit *pending* between others * * * requires by its express terms timeliness of action on the part of the intervener."

[*School Dist of Ferndale, supra* at 12, quoting *Zeitinger v Hargadine-McKittrick Dry Goods Co*, 298 Mo 461; 250 SW 913 (1923) (emphasis added).] Here, because the AG waited until the case was finally resolved by the Court of Appeals, and not even subject to a motion for reconsideration, the "Notice of Intervention" was filed too late to do any good.

III. THE AG COULD NOT PROPERLY INTERVENE IN THE COURT OF APPEALS BECAUSE THE STATE OF MICHIGAN'S "INTEREST" IN THIS CASE IS NOT SUFFICIENT TO GIVE RISE TO A JUSTICIABLE CASE OR CONTROVERSY UNDER MCL 14.28.

As noted, the statute cited in support of intervention argument requires that the State of Michigan be "interested" in a pending "cause or matter" as a condition to the AG's ability to intervene. Intervention by the AG is not automatic. The Legislature has placed limits on the AG's right to participate. In order for the AG properly to intervene, the AG must conclude "in his own judgment that the interests of the state require it," and the matter must be one "in which the people of this state may be a party or interested." MCL 14.28. The last clause of the statute—which ensures the existence of an actual case or controversy—necessarily requires *the court* to pass on the propriety of intervention; otherwise it would be superfluous.

MCL 14.28 confers no special rights on the AG as a litigant (i.e., rights over and above those possessed by the other litigants in a case). See *John Wittbold & Co, supra* at 513. Thus, there is no basis to believe that the AG should or could be deemed immune from the constitutional requirements of standing imposed on all litigants. See generally *National Wildlife Fed'n v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004). Therefore, it would be logical to construe the "interest" requirement of MCL 14.28 as being consistent with the "particularized interest" necessary for a party to establish standing. This is especially true in cases such as this where the AG seeks to intervene as a plaintiff.[6] Otherwise, the AG would be able to avoid the standing

[6] Because the AG is advocating on behalf of the plaintiff for a reversal of the Court of Appeals decision, the AG has stepped into the shoes of the original plaintiff and is participating in a plaintiff in this case.

requirement by waiting until after a case is filed by another plaintiff (that actually has standing) before intervening under MCL 14.28. Simply put, the AG must have standing to act as a plaintiff in this case.

In Michigan, for a party to have standing, three elements must be established: First, the plaintiff "must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of; the injury has to be "fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."' *Lee v Macomb County Bd of Comm'rs*, 464 Mich 726, 739-740; 629 NW2d 900 (2001), quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992).

There can be no serious dispute that the AG fails the standing test. The AG's only interest in this case is based on the precedent that might be established for future cases. The AG does not care what happens to the Road Commission or the original plaintiff in this dispute; it is worried only about how the decision might impact some *future* cost recovery action brought by the Michigan Department of Environmental Quality ("MDEQ") involving different facts. (See the AG's brief at p 19; the AG's application for leave to appeal, pp vi-vii, 6, 15-17, 19-20; Appendix U, p 94b, the AG's Notice of Intervention, ¶ 5). If this sort of "precedent injury" were sufficient to give rise to standing, the standing requirement would be rendered essentially meaningless. Because the State of Michigan has no property interest, or any other "concrete and

particularized" interest, at stake in the outcome of the Federated-Road Commission dispute, its "injury" is too remote and too speculative to confer standing on the AG. For the same reason, the State of Michigan has no justiciable "interest" in the outcome of this litigation sufficient to give rise to a right to intervene under MCL 14.28.

The AG is essentially asking this Court to resolve a hypothetical dispute. We do not know the facts of the hypothetical future case imagined by the AG. Perhaps it would be factually or legally distinguishable from this case. That can be decided later, if necessary. But until that imagined future case filed by the State of Michigan actually occurs, any decision from this Court addressing the AG's concerns would be nothing more than an advisory opinion. Our system of jurisprudence requires the resolution of live controversies. Opinions rendered on hypothetical questions are not constitutionally permissible. See generally *National Wildlife Fed'n, supra* (explaining why the judicial branch is constitutionally restrained from entering into the resolution of hypothetical disputes). If necessary, the Supreme Court can consider the AG's concerns regarding a state-filed cost recovery action when and if such a case ever happens. But for now, this Court's review is necessarily limited to *the facts of this case*. See *National Wildlife Fed'n, supra* at 806-807.

Because the only plaintiff with any particularized interest in the facts of this case has elected not to pursue this matter beyond the Court of Appeals, this Court should vacate its order granting the AG's application for leave to appeal. The "interest" of the State of Michigan required by MCL 14.28 necessarily must be equivalent to the "interest" any other plaintiff must show to have standing to pursue a lawsuit.

IV. THE AG DOES NOT HAVE STANDING TO ASSERT THE RIGHTS OF THE ORIGINAL PLAINTIFF, WHICH IS NO LONGER A PARTY TO THIS LITIGATION.

It would be one thing to allow the AG to intervene into a case where the State of Michigan has its own particularized interest that is aligned with the interest of an existing plaintiff. It is quite another, however, to allow the AG to intervene into a case to *replace* the original plaintiff and to advance arguments solely *on behalf of* the original plaintiff. Here, to the extent that the AG is not asking for the resolution of a hypothetical cost recovery action brought by the MDEQ, it is effectively "standing in the shoes" of the original plaintiff and advancing a cause on behalf of the original plaintiff. This too is not permitted. It is a well established principle of constitutional law that a "[a] plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." See *Fieger v Comm'r of Ins.*, 174 Mich App 467, 471; 437 NW2d 271 (1988), citing *Warth v Seldin*, 422 US 490, 499; 95 S Ct 2197; 45 L Ed 2d 343 (1975), and *Tileston v Ullman*, 318 US 44; 63 S Ct 493; 87 L Ed 603 (1943).

V. THE ISSUE ON APPEAL IS MOOT BECAUSE THE ORIGINAL PLAINTIFF HAS FORFEITED ITS RIGHT TO PROCEED BY ELECTING NOT TO FILE AN APPLICATION FOR LEAVE TO APPEAL FROM THE ADVERSE COURT OF APPEALS DECISION.

The original plaintiff, Federated Insurance Company, elected not to take an appeal from the Court of Appeals decision within the time permitted by the court rules. See MCR 7.302(C)(2). Accordingly, the case is over as far as the original plaintiff is concerned.

By refusing to challenge the Court of Appeals final decision in appeal to the Supreme Court, the original plaintiff has forfeited its right to proceed further in this matter. Forfeiture is the failure to timely assert a right. E.g. *People v Phillips*, 469 Mich

390, 396; 666 NW2d 657 (2003). As the *only* party adversely affected by the Court of Appeals decision, Federated had to seek leave to appeal from the Court of Appeals decision in order proceed further in this litigation. It did not do so.[7]

If the original plaintiff is barred from continuing in this litigation (as it should be), then further proceedings regarding the statute of limitations are necessarily moot. If no further litigation will occur on remand, then it makes no sense for this Court to resolve the statute of limitations issue now. Whether the original plaintiff is barred by the statute of limitations is of no consequence if the original plaintiff has already dropped out. "A case is moot when it presents 'nothing but abstract questions of law which do not rest upon existing facts or rights.'" *East Grand Rapids School Dist v Kent Co Tax Allocation Bd*, 415 Mich 381, 390; 330 NW2d 7 (1982), quoting *Gildenmeister v Lindsay,* 212 Mich 299, 302; 180 NW2d 633 (1920). The original plaintiff's ability to overcome the statute of limitations and proceed against the Road Commission is now nothing more than an abstract question that is not based on any *existing* right.

VI. THE ISSUES RAISED FOR THE FIRST TIME IN THIS APPEAL BY THE AG ARE NOT PRESERVED.

The *only* argument made by the original plaintiff, in response to the Road Commission's motion for summary disposition, was a legal argument based solely on the alleged existence of a "discovery rule." (Appendix S, pp 68b-69b). Now, facing a *different* party in the Supreme Court, the "discovery rule" is no longer an issue. The AG does not challenge the conclusion of the trial court or Court of Appeals regarding the

[7] Setting aside questions of forfeiture, it would be manifestly unfair to allow Federated back into this case in the event of a remand. Such a result would allow Federated to reap the benefit of a victory in the Supreme Court without doing any of the work or expending any money. If Federated felt that its position were worth fighting for, then Federated should have filed an application for leave to appeal.

discovery rule, but instead makes a number of entirely new arguments. As a result, this Court finds itself "reviewing" questions that have never before been raised by a party that has not been involved in the litigation and that is both unfamiliar and unconcerned with the factual record. These new questions are not preserved for appeal. This Court has warned of the problems associated with the resolution of unpreserved issues. In *Napier*, *supra* at 228-229, this Court explained that a strong preservation rule is necessary to ensure that (1) issues are properly framed by adversarial parties, (2) parties have an opportunity to respond at the appropriate time, (3) issues are resolved efficiently, and (4) lower courts are not reversed based on grounds never presented to them. The primary reason for the preservation rule is the policy of encouraging the resolution of issues in the least expensive forum. *Id.* Requiring that issues be raised in the trial court reduces the costs associated with unnecessary appeals and re-trials. *Id.* All of the typical preservation problems are at play in this appeal and counsel against further proceedings in this Court.

SUBSTANTIVE ARGUMENT

When the actual facts of this case are divorced from the AG's concerns about what might happen in some later dispute, and from this Court's specific briefing directions (which assume both a disputed legal issue and a fact not in existence in this case), the decisions of the trial court and Court of Appeals make sense.

In a nutshell: The original plaintiff alleged that the Road Commission released hazardous materials on property adjacent to the original plaintiff's subrogor (CMS) as early as 1988. The Road Commissions reported releases occurring in April and May of 1991. In November 1991, the original plaintiff and/or CMS began physical construction

of a groundwater treatment system designed to remove free product from the ground water on CMS's property. The department formally approved the groundwater treatment plan in 1992. The original plaintiff suspected, as early as in 1992, that the Road Commission might be liable for some of the costs of the groundwater treatment system (based on the fact that the same groundwater treatment system used to treat CMS's release might also be inadvertently treating a Road Commission release). This suspicion was confirmed in 1995, when the department concluded that the CMS treatment system had removed some free product attributable to the Road Commission's release. In 1996, the original plaintiff notified the Road Commission that it would be sued in a cost recovery action. Then, in the Fall of 1997, as the end of the six-year period since the initiation of physical on-site construction activities was approaching, the original plaintiff threatened to sue the Road Commission if it did not obtain a tolling agreement (which it did not obtain). It was not until three years later that the original plaintiff actually filed suit.

Accordingly, this case is *not* the hypothetical case feared by the AG for a number of reasons: (1) the Road Commission's release occurred *before* the initiation of on-site physical construction of the ground water treatment system; (2) the original plaintiff did nothing more to remedy the Road Commission's release other than what it was already required to do to remedy its own release; (3) the original plaintiff knew that the Road Commission was a potentially liable party within six years after the initiation of the physical construction of its groundwater treatment system; and (4) the original plaintiff was aware of the six year statute of limitations running from November 1991, but still failed to bring suit within that time. Under these facts, the Court of Appeals decision was

correct. Resolution of a case involving other, different facts, of the kind the AG fears, should wait until that other case arises.

The following sections address the legal arguments raised on appeal by the AG and by this Court.

VII. BECAUSE THE WORK INITIATED BY THE ORIGINAL PLAINTIFF IN 1991 WAS A "REMEDIAL ACTION SELECTED OR APPROVED BY THE DEPARTMENT" WITHIN THE MEANING OF MCL 324.20140, THE SIX-YEAR STATUTE OF LIMITATIONS EXPIRED IN 1997.

A. *The construction and operation of the CMS groundwater treatment system constituted a "remedial action."*

The AG's first argument on appeal was not raised or addressed below. While the trial court and Court of Appeals both concluded that CMS's physical construction of a groundwater treatment system pursuant to a plan approved by the MDNR constituted "remedial action" as defined by MCL 324.20101(cc), the original plaintiff never raised the definition of "interim response activity" as a reason for why the groundwater treatment system should not be deemed a "remedial action." Moreover, in the trial court, the original plaintiff did not challenge the Road Commission's assertion that the CMS groundwater treatment system was a "remedial action." To the contrary, the original plaintiff accepted the Road Commission's statement of facts and argued, as a matter of law, that its claim was not barred by the statute of limitations through the application of a "discovery rule." Accordingly, this Court is the first court to have an occasion to consider the question in this litigation. Had the question been controverted below, perhaps the parties would have been able to develop a fuller record on the issue. Until this Court granted leave, however, this case was never about "interim response activities."

The term "remedial action," as used in the applicable statute of limitations (MCL 324.20140) is defined by statute. When a word used in a statute is itself specifically defined by statute, the statutory definition alone controls. E.g. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996). "Remedial Action" is specifically defined in MCL 324.20101(cc) as follows:

> "Remedial action" includes, but is not limited to, cleanup, removal, containment, isolation, destruction, or treatment of a hazardous substance released or threatened to be released into the environment, monitoring, maintenance, or the taking of other actions that may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment.

The documents attached to the Road Commission's motion for summary disposition demonstrate that the CMS groundwater treatment system was a substantial device housed within a 20-foot by 20-foot building, with electricity, a separating tank, and its own sewer system. (Appendices C-H, J, Memos from Kraus & Kriscunas, P.C., with attached invoices; Appendix I, pp 26b-33b). The undisputed function of the CMS groundwater treatment system was to extract contaminated groundwater from the CMS property, separate and remove free product from the groundwater, thereby isolating and containing the free product, and return the treated water to the sanitary sewer system. (Appendix I, pp 26b-33b; Appendix O, p 55b). As part of its plan, CMS was also responsible for monitoring the progress of its free product removal. (Appendix K, pp 39b-40b). These activities fit perfectly within the statutory definition of "remedial action." The CMS groundwater treatment system involved the "cleanup," "removal," "containment," "isolation," "treatment," and "monitoring" of hazardous releases from both CMS and the Road Commission. Moreover, it is undisputed that the goal of the CMS groundwater treatment system was to "minimize, or mitigate injury to the public health, safety, or

welfare, or to the environment" by isolating and removing free product. For these reasons, the groundwater treatment system constituted a "remedial action" within the definition of MCL 324.20101(cc).

The definition of "interim response activity" is similar, but not identical to, the definition of "remedial action":

> "Interim response activity" means the cleanup or removal of a released hazardous substance or the taking of other actions, prior to the implementation of a remedial action, as may be necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, or to the environment. Interim response activity also includes, but is not limited to, measures to limit access, replacement of water supplies, and temporary relocation of people as determined to be necessary by the department. In addition, interim response activity means the taking of other actions as may be necessary to prevent, minimize, or mitigate a threatened release.

Unlike the definition of "remedial action," the definition of "interim response activity" does not include the "containment," "isolation," "treatment," or "monitoring" of hazardous releases—all of which were involved in the CMS groundwater treatment system. Because the CMS groundwater treatment system involved functions that fit within the definition of "remedial action," but are not included within the definition of "interim response activity," this Court should conclude that the CMS groundwater treatment system was a "remedial action" and not merely an "interim response activity."

The AG argues that the CMS groundwater treatment system could not be a "remedial action" because it did not meet the requirements of MCL 324.20118, MCL 324.20120a, and MCL 324.20120b. This argument misses the mark for a number of reasons. First, the AG does not establish that the CMS groundwater treatment system actually failed to meet the requirements of these statutes. Because the original plaintiff accepted without contest the Road Commission's assertion that the CMS groundwater treatment system was a "remedial action," the parties below never had a reason to

develop the record with respect to the points now raised, for the first time, on appeal by the AG. Nor does the AG even attempt to explain how or why MCL 324.20120a and MCL 324.20120b were not satisfied.

Second, the requirements in MCL 324.20118 set forth what a remedial action must "accomplish." The fact that a new or ongoing remedial activity has not *yet* "accomplished" the requirements set forth in MCL 324.20118 does not mean that it will not eventually do so and, therefore, does not mean that it does not qualify as "remedial action" during the time within which it is in the process of "accomplishing" the requirements set forth in MCL 324.20118.

Third, nothing in the definition of "remedial action" states that a "remedial action" must satisfy any other statutes, or be specifically approved by the department, to qualify as "remedial action." The AG's argument adds requirements that the Legislature did not see fit to attach to the definition of what constitutes "remedial action."

For all of these reasons, this Court should not upset the conclusion of the Court of Appeals, the trial court, the Road Commission, and the original plaintiff that the CMS groundwater treatment system was a "remedial action."

B. *The CMS groundwater treatment system was a remedial action "selected or approved" by the MDNR.*

As set forth above in the Counter Statement of Facts, the MDNR directed CMS, in 1988, to "take all corrective actions necessary to remediate any environmental damage that has occurred" as a result of its release. (Appendix B, p 6b). On January 22, 1993, about one year after CMS's treatment facility was up and running, the MDNR sent a letter to CMS formally indicating its approval of the treatment plan. (Appendix K, pp 38b-41b). Both the trial court and Court of Appeals found the 1993 MDNR letter to

constitute sufficient departmental "approval" of the groundwater treatment system so as to bring its construction within the meaning of a "remedial action selected or approved by the department."[8] This result is not surprising given the clear language used by the MDNR. The 1993 letter specifically states that CMS is "*requested to immediately implement* a groundwater treatment system as previously proposed...," and that CMS has "*approval* to proceed with the work plan..." (Appendix K, p 39b, emphasis added). Certainly, a letter from the MDNR expressly giving "approval" and requesting the immediate implementation of a remedial action constitutes "selection or approval" by the department within the meaning of MCL 324.20140.

C. *The statute of limitations expired on November 1, 1997.*

It is undisputed that CMS and/or the original plaintiff began physical on-site construction of the groundwater treatment system, the aforementioned "remedial action," on or about November 1, 1991. Because the "initiation of physical on-site construction activities for the remedial action selected or approved by the department" began on November 1, 1991, the statute of limitations set forth in MCL 324.20140 expired on November 1, 1997. Notably, this was one day after the date by which the original

[8] This Court's statement of the issues to be addressed on appeal assumes that the "remedial action" triggering the statute of limitations must "first" be "approved or selected" by the department. This assumption is not correct. The trial court and Court of Appeals held otherwise and nothing in the plain language requires that the department's approval or selection of the remedial action occur before the statute of limitations is triggered. The controlling statute of limitations merely states that a plaintiff who is incurring response activity costs, and wishes to sue for the recovery of a portion of these response activity costs, must do so within six years after "the initiation of physical on-site construction activities for the remedial action selected or approved by the department." While this requires that the remedial action be "selected or approved" by the department, its does not say that the "remedial action" must "first" be selected or approved by the department. Moreover, the statute is clear that the limitations period does not run from the time of "selection or approval," but rather from the "initiation of physical on-site construction activities."

plaintiff threatened to sue the Road Commission if its proposed tolling agreement went unsigned. (Appendix R, p 58b.)

Even if this Court were to conclude that the statute of limitations should run from the date of approval rather than the date of the initiation of physical on-site construction activities, this case *still* would not have come within the limitations period, since it was not filed until November 1, 2000, more than seven years after the MDNR expressly approved the CMS groundwater treatment system on January 22, 1993.

VIII. ALTHOUGH THE AG IS CORRECT THAT A COST RECOVERY ACTION CANNOT ACCRUE BEFORE COSTS HAVE BEEN INCURRED BY THE PLAINTIFF, THAT IS NOT WHAT HAPPENED IN THIS CASE.

The AG makes a curious (and telling) argument that a cost recovery action cannot accrue until the plaintiff has first incurred response activity costs. The Road Commission agrees with this statement of law, but wonders how it has any application to the present case. Here, the original plaintiff alleged in its complaint that it had already incurred remediation costs and expenses. (Appendix A, pp 3b-4b, ¶¶ 9, 12). Moreover, it is not disputed that the original plaintiff sought to recover contribution from the Road Commission for the costs associated with the construction and maintenance of the CMS groundwater treatment system, which certainly began to accrue by November 1, 1991, when physical construction began. There is no question that the original plaintiff began to incur response activity costs long before this case was ever filed.

It is apparent that the AG's concern is directed toward a different case with different facts. (See the AG's brief, pp 19, 21-22). The AG argues that it would be "nonsensical to require MDEQ to sue to recover costs before it has incurred costs merely because the liable party has taken some action." (AG Brief, p 22). That very well may be true, but that is not this case and that result is not mandated by the Court of Appeals

decision in this case. It is patently unfair and inefficient to require the Road Commission (a public body) to prevail against the *real* plaintiff in the Court of Appeals based on the *real* facts, and then have to defend the resulting Court of Appeals decision against a *different* legal challenge, brought by a *different* entity, based on *different* facts.

IX. THE ACCRUAL OF STATUTE OF LIMITATIONS IS BASED ON THE NATURE OF THE RESPONSE ACTIVITY, NOT ON THE SOURCE OF THE RELEASE.

This Court has directed the parties to address "whether the initiation of work for one release of hazardous substances begins the running of the statute of limitations for any subsequent or unrelated release of hazardous substances." As an initial matter, the Road Commission notes that the Court's question (like the AG's argument) describes a set of facts different from those in the present case. Here, it is true that the Road Commission's release was separate from the CMS release. In that sense, then, it was "unrelated" to the CMS release. It is undisputed, however, that the Road Commission's release was not "subsequent" to CMS's initiation of work in response to the CMS release. That point aside, the Road Commission responds to the Court's question by answering that, "it depends."

The critical point to consider in addressing the Court's question about "unrelated" and "subsequent" releases is that both the cause of action and the statute of limitations at issue are focused on *incurred costs* rather than on the nature and source of the *releases* that led to those costs. It is incurred costs of response activity that gives rise to a cost recovery action. Correspondingly, it is the initiation of physical on-site construction activity for *"the* remedial action" at issue that triggers the running of the statute of limitations. MCL 324.20140 (emphasis added). Where two unrelated releases prompt separate remedial actions (which would seem to be a more likely scenario), then the

running of the statute of limitations for each release would depend on the initiation of physical on-site construction activity for each separate remedial action.

In this case, while there may have been two "unrelated" releases, it is undisputed that the original plaintiff's cost recover action involves a single, unified response by CMS. CMS and/or the original plaintiff built the groundwater treatment system to treat the CMS release on CMS property. In the course of so doing, the CMS groundwater treatment system also inadvertently removed some free product that came from the Road Commission's pre-existing release. CMS directed no specific remedial action toward the Road Commission release. Because there was only *one* remedial action, by *one* actor (CMS), there was only *one* set of response activity costs to be recovered. Moreover, because there was only *one* set of response activity costs to be recovered, there should only be *one* accrual date for the statute of limitations. Based on the plain language of the statute of limitations, that *one* accrual date should be determined based on the "initiation of on-site physical construction" for "the" *one* remedial action at issue. MCL 324.20140.

By enacting MCL 324.20140(1)(a), the Legislature determined that six years from the "initiation of on-site physical construction activities" provides sufficient time for a plaintiff that is *already incurring costs* to investigate and file a claim against a potentially liable party. Although the wisdom of the policy advanced MCL 324.20140(1)(a) is not an issue before this Court, one can imagine any number of reasons for requiring the party that is actually incurring response activity costs (*i.e.*, in the form of on-site construction activities) to identify and file suit against other potentially liable parties within six years after the initiation of such activity. Some possible rationales for the policy include

allowing defendants a fair opportunity to defend themselves, relieving courts of the burden of dealing with stale claims, and relieving protracted fear of litigation.

Moreover, giving the plaintiff six years from the initiation of physical activities to (1) determine who might share liability for the response activity costs and (2) file suit against the potentially liable party, can hardly be described as an onerous burden. In this case, the original plaintiff's mailing of a 60-day notification letter mailed to the Road Commission on September 4, 1996—more than one year before the expiration of the statute of limitations—demonstrates that it was aware of the Road Commission's potential liability within the time period set forth by the Legislature. Especially significant and telling is the fact that the original plaintiff sought a tolling agreement from the Road Commission "by the end of October, 1997," which was exactly six years after the initiation of on-site physical construction activities. This demonstrates that original plaintiff was well aware of the controlling statute of limitations. To hold otherwise would defeat the legislative policy set forth in the plain language of MCL 324.20140(1)(a).

The AG's fear that "once the statute of limitations for one release expires, the real property encompassed by the original release can never be subject to another cost recovery action" is ludicrous hyperbole. (See the AG's brief, p 25). Certainly the AG would be able to find a way around such a result if it were actually faced with such a case. For starters, the AG could point out that the *Federated Insurance* case did not deal with subsequent releases on the same "real property." The concept of "real property" was never even mentioned by the Court of Appeals. Moreover, the *Federated Insurance* case involved only *one* single remedial action undertaken by *one party*. Therefore, it

would have no application whatsoever to a cases involving separate remedial actions and it would be readily distinguishable from cases involving two separate parties starting at separate times to remedy one or more releases. The bottom line is that this case involved only one remedial action and one set of response activity costs by one actor. The same cannot be said for the hypothetical future cases feared by the AG.

RELIEF REQUESTED

For the procedural reasons stated above, this Court should vacate its order denying leave to appeal. Otherwise, for the substantive reasons stated above, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

CLARK HILL PLC

By: 

Elizabeth Jolliffe (P42712)
Paul C. Smith (P55608)
Attorneys for Defendant-Appellee
500 Woodward Avenue, Suite 3500
Detroit, Michigan 48226
(313) 965-8300

Dated: August 31, 2005

STATE OF MICHIGAN
IN THE SUPREME COURT
(On Appeal from the Michigan Court of Appeals)

FEDERATED INSURANCE COMPANY,
a foreign corporation, as Subrogee of
Carl M. Schultz, Inc.

Plaintiff,

and

ATTORNEY GENERAL,

Appellant,

v.

ROAD COMMISSION FOR OAKLAND COUNTY,

Defendant-Appellee,

/

Supreme Court No. 126886
Court of Appeals No. 244009
Oakland Circuit No. 00-027170-CZ

ROAD COMMISSION FOR OAKLAND COUNTY'S BRIEF ON APPEAL

Oral Argument Requested

Thomas L. Casey (P24215)
Kathleen L. Cavanaugh (P38006)
Robert P. Reichel (P31878)
Environmental, Natural Resources,
and Agriculture Division
525 W. Ottawa, Williams Bldg., 6th Floor
P.O. Box 30755
Lansing, MI 48909
(517) 373-7540
Attorneys for Appellant

Elizabeth Jolliffe (P42712)
Paul C. Smith (P55608)
Clark Hill PLC
500 Woodward, Suite 3500
Detroit, MI 48226
(313) 965-8300
Attorneys for Defendant-Appellee

/

PROOF OF SERVICE

Jill M. Beyer of Clark Hill, PLC, being duly sworn, says that on August 31, 2005, she served **two (2) copies each** of Road Commission For Oakland County's Brief On Appeal—Appellee, Defendant-Appellee's Appendix and this Proof of Service, via U.S. Mail upon:

Kathleen L. Cavanaugh
Environmental, Natural Resources,
and Agriculture Division
525 W. Ottawa, Williams Bldg., 6th Floor
PO Box 30755
Lansing, MI 48909

And

Michael L. Updike
Secrest, Wardle, Lynch, Hampton
Truex and Morley
30903 Northwestern Highway
P.O. Box 3040
Farmington Hills, MI 48333-3040

Jill M. Beyer

Subscribed and sworn to before me
This 31st day of August, 2005.

Beth Boice

BETH BOICE
NOTARY PUBLIC, STATE OF MI
COUNTY OF OAKLAND
MY COMMISSION EXPIRES Nov 21, 2011
ACTING IN COUNTY OF Wayne